University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at No. 8 West King St., Lancaster, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 61 JUNE, 1913 NUMBER 8

THE SOCIAL SCIENCES AS THE BASIS OF LEGAL EDUCATION.[1]

The subject assigned to me is the social sciences as the basis of legal education. As I am not certain that we all agree on the meaning to be attached to the term "social sicences," for the sake of clearness I shall begin with a definition. As here employed a social science is any science which deals with groups of persons. Every society—that is, every collection of persons—is composed of one or more groups. We have in this country, for instance, the nation, the state, the municipality, the family. The concept on which these groups rest, except the last, though partly racial, is in the main territorial unity. Other societies may have groups resting mainly on racial unity or others again those whose basis is similarity of economic condition or occupation. These illustrations are sufficient to show that the word "group" as here used does not denote an arbitrary classification. The group is real. Its essence is the consciousness of unity in its members.

Each individual member of society with more or less clearness has his conception of the group or groups to which he belongs.

[1]A paper read before the Conference on the Relation of Law to Social Ends, held in the College of the City of New York, April 25, 1913, and at Columbia University April 26, 1913,

He also has a conception of other groups and of the relation of a group of which he is a part to its individual members, as well as the relation of the members of the group to each other and of one group to another group. These conceptions of groups and their relations we may term his social ideas. If similar ideas are sufficiently prevalent among the members of the community they are the "social ideas" of that community. It is needless to point out that the study of the laws of group development and the growth of conceptions of the various relations above outlined are or ought to be important branches of social science.

My object is to examine the place, if any, which social science as above defined, and especially the branch of it just referred to, has in legal education.

Our ideals concerning legal education are in great part conscious or unconscious reflections of our conception of the functions of the lawyer and judge,—the nature of the work which they are called upon to do. We all agree that the law student should study such things as Contracts, Property and Procedure. Obviously he will find a knowledge of these things necessary in his business. But how far if at all he should study a subject whose bearing on his future work is not so obvious, and the methods he should employ if he undertakes such study, depend in great degree on our conception of law. If we look at law—that is, the law of the lawyer, the municipal law,—as a body of fixed rules, and take only a practical view of it, we will conclude that the student of law is prepared for his life work if he learns the more important of these rules, and, through a study of illustrative cases, acquires some degree of skill in applying them. If we have, however, another idea of the nature of law we will,—if we think about the subject at all,—have a different idea of the things which the law student should study, as well as the methods to be employed by the teacher of law, if the student is to prepare properly for the profession.

Personally, I believe that a law is a form of expression of a social idea. Take a simple example. A by his own labor makes a boat. We will suppose that the law protects what it designates as his right of possession, and that it also protects his right to use the boat or his right to have the boat remain unused. Suppose further that this law is regarded as just and having no exceptions. Does not this indicate that the members of the community do not

conceive of any relation between them not arising out of contract, which obliges the boat builder to spend his time or use wealth possessed for the benefit of anyone but himself? When, however, the members of the community have a social idea involving a conception of a relation, not arising out of contract, between the individual and other individuals or groups of individuals, the law expressing these ideas will modify the rights of the boat builder. Thus in our own law, though we recognize the right of a person in the position of the builder in the illustration to possess and use his boat, we also recognize the right of the state to take it from him, compensation being given. We recognize this right because our social ideas involve a conception of relations between the individual and certain groups which we call nation, or state, or municipality. We do not, however, prevent the boat builder from destroying the boat or oblige him to put it to some use, and our Constitutions expressly prohibit the boat being taken from him even for public use without compensation. A law which would permit the boat to be taken for public use without compensation, or oblige the boat builder either to put it to some use or give it to some one else, would express social ideas differing radically from the ideas of those who drafted the Bills of Rights in our national and state constitutions.

If I am right in stating that law is a form of expression of social ideas, it is obvious that law must change with changes in social ideas. The existing social ideas of a people are the products of the environment history of its groups. These ideas are constantly being modified by the difference between present and past environment. When a law ceases to express the social ideas of a group the members begin to regard it as unjust. If the group is politically effective there will be a change in the law. It is vitally important that law should express dominant social ideas. Without a reasonable correlation between law and dominant social ideas orderly progress is impossible. A law which does not express a dominant social idea is worse than useless. If it is the result of legislative action, it operates as a constant irritant tending to bring all legislation into contempt. If it is the result of a judicial decision it unsettles confidence in the court. The law is regarded as unjust, and it is unjust. There is no such thing as abstract justice. That is just in any community

which corresponds to the community's felt sense of right. He who desires a law contrary to existing social ideas should labor not to produce a change in the law but a change in social ideas.

If I have in any degree made clear my conception of the nature of law and the necessity for a close correlation of law and existing social ideas, let us turn for a moment to the nature of the service which the community has a right to expect from the courts and the legal profession. They certainly have a right to expect an efficient administration of law. Law is administered efficiently, only when, being administered impartially and as rapidly as is consistent with reasonable care, the principles of law are so applied as to produce those modifications necessary to make the law correspond to changes in dominant social ideas. This last needs explanation. It involves the old controversy as to whether the judge makes or should make law. Like many other questions it became and continues a controversial question only because the participants confuse two distinct things which we may term respectively "legal rules" and "legal principles." The distinction between them is fundamental, whether we regard it as one of kind or one of degree.

A legal rule is always applicable to the facts to which it is intended to apply. For instance, a law giving thirty days for an appeal, or requiring a check drawn on the State Treasury to be countersigned by the Controller, or designating definite terms as necessary conditions to the negotiability of a promissory note, are all legal rules. Legal rules are often made by legislative action. They are, however, also often the result of repeated judicial decisions on practically identical facts. The negotiable instruments law, for instance, while statutory in its present form in most states, is made up of rules very largely based on judicial decisions. Whether first expressed by legislative action or judicial decree, a rule of law once fixed should not be altered by a judge no matter how unwise he may regard it. A judge may properly help to make a rule of law, but not to unmake it.

A legal principle, on the other hand, while it always tends to apply, is never universally applicable. It will be applicable with certainty only when the facts afford no possibility of a definite result being reached by the application of another legal principle. For instance, we say that a promise on consideration is

binding. This is not a legal rule, it is a legal principle. It is not true that whenever we have a promise given on a consideration there is a binding legal obligation to perform that promise. All that is true is that where there is a consideration for a promise there is a strong tendency to make it binding on the promisor. But this tendency may be overcome in a particular case by a stronger tendency. It is also a legal principle that property should not be taken from one in possession except by his own consent or by legal process. Suppose a case in which A promises B on a consideration to take property by force from C. Both principles apply and are mutually conflicting. In the case put the last stated principle prevails and we all regard the result as just, because the result expresses our social ideal which regards the obligation to perform a promise as less important than the obligation to refrain from violence. If law was merely a body of rules as I have used the term "legal rule" it would be easy and dull. But the law has something more than legal rules; it has legal principles, and the inevitable conflict of legal principles makes the law the wonderfully interesting science which it is.

A judge, in the decision of a case which involves more than the application of a legal rule, not only has to know the principles applicable but their relative importance. If he is worthy, when two principles apply to the facts of a case and are conflicting, he places the emphasis, not where some temporary emotional wave may want him to place it, but where the really dominant existing social ideals require that it should be placed. If he does this, he will and should mould and change the law to make it conform to changes in existing social ideas. If we take the history of our case law from the Year Books to the present day, we will find this progress of development and change by judicial decisions always going forward. A principle of law once clearly stated rarely disappears, but the emphasis placed on the importance of the principle changes with changing social ideas. In this way, without sudden jar, profound alterations in the law have been produced. For just as legal principles are of more importance than legal rules, so the relative degrees of emphasis placed on different legal principles are of more inportance than the principles themselves. For instance, at one time the labor law in all its phases was determined largely by legal status. A man's status, whether as lord, or vassal, or servant,

imposed upon him certain obligations. There was little scope for contractual relations. This condition of the law was not changed by any legislative fiat. The decisions of the courts made it constantly harder for the lord to retain with profit servile labor. The principle that every man is presumed to be able to go where he pleases and contract as he pleases was given constantly increasing emphasis. Thus the judges, by a process largely unconscious even to themselves, affected profound changes in the law corresponding to equally profound differences in the social ideas of feudal as compared with those of modern times.

In certain branches of the law, as procedure, the law of property, and to a less extent the commercial law, where a high degree of certainty is desirable, legal rules created by judicial and legislative action rightly predominate. In the domain of torts, on the other hand, justice in the individual case in view of all the facts is of prime importance. It is in this branch of the law that principles clash. It is here that our courts perform their most difficult and most important service. For it is in tort cases that the community has a right to look to the courts to make their decisions meet the felt sense of right which springs from existing social ideas.

If a law is a form of expression of a social ideal and one of the necessary functions of courts is to mold the law, in the way and within the limitations above described, to meet the changes in social ideas as they occur, it is manifest that social science, and especially that branch of it which deals with group development and the growth of social ideas is a necessary part of legal education. Indeed, if we admit that law is the expression of social ideas the study of the forces by which those ideas are developed and changed is necessary to a thorough grasp of the development of the law, and being so necessary may be regarded as an essential basis of a thorough legal training. The fact that it is the judge who nominally alone performs the function of developing law by a decision does not lessen the force of this conclusion. The legal writer has always had an effect and is probably destined to have in the future a still greater effect on the law's development; and again, not only is the judge taken from the ranks of the profession, but as every lawyer knows by experience, the work of the judge cannot be adequately performed without the assistance of an educated Bar.

The importance of the social sciences as part of the training

of the lawyer is greatly increased by existing conditions. In the last few years there has been growing among all classes of the community a distrust in the justice of the law. We are also told that the lawyer has not only lost his position of leadership in social and political thought, but that the community, taken as a whole, have become antagonistic to what they regard as the legal point of view towards fundamental public questions. This last assertion contains perhaps some truth though I believe the antagonism as described is exaggerated. There is, however, a growing distrust in the justice of the law and by reflex action some feeling of antagonism to lawyers and especially judges.

The fundamental cause of this feeling that the law is unjust is, I believe, the fact that we are passing through a period of comparatively rapid change in some of our fundamental social ideals.

History shows us that there are periods when for a considerable time social ideals undergo little change. Again, there are periods when new social ideals which have been perhaps slowly gathering force suddenly receive sufficient general acceptance to create an insistence that the law be adjusted so as to give the ideal expression. It is not easy to judge accurately the importance to be attached to changes in current thought until time has tested their strength and permanence. The most casual observer, however, cannot fail to see that as a people we are apparently in the process of shifting the emphasis which we place on certain fundamental social ideas, using the word "fundamental" in the sense of far-reaching application.

The world into which most of the persons now gathered in this room were born was a world in which progress was measured by incomes, national and individual, and in which the liberty of the individual was regarded as almost the sole requisite of social progress. These basic social ideas were and are expressed in legal principles, chief of which is the right of free contract, as also the principle which declares that a loss resulting from a risk voluntarily assumed should be borne by the person assuming the risk. As a consequence, the statement that a workman and employer may enter into any contract, irrespective of the effect of the conditions of the contract on the workman, and that the master is not liable for an accident occurring from a condition of which the workman was aware, are statements which need little qualification to ex-

press the result of judicial decision. That these laws no longer satisfy the felt sense of justice in the community is a sure indication that the idea of the proper measure of progress and the proper emphasis to be placed on the importance of the right of free contract has been affected by a growth in the relative importance of other social ideas. Exactly what the social ideas are which have thus disturbed the old ideals it may, at this short range, be difficult to state with a sure conviction that the statement is accurate. But apparently we are ceasing to test progress by income and are beginning to test it by prosperity. As prosperity is not obtained unless the great bulk of the people are prosperous, a contract made by one man with a large number of others,—and such contract is more and more the typical labor contract—the conditions of which fail to render the laborer prosperous, is beginning to be looked upon as unjust. We are witnessing the rise of the doctrine of the living wage. Only with a living wage is prosperity possible. Yet, as a necessary consequence, we are modifying the emphasis formerly placed on the importance of the freedom of contract. From the same cause also we are witnessing the rise of the feeling, now being everywhere translated into statutory law, that loss, the result of accident occurring in a risk voluntarily assumed by an employee, should not be allowed to rest on him alone.

It is immaterial whether or not I have correctly interpreted the more fundamental changes which are taking place in our social ideas, provided my main thesis is correct, namely, that no such widespread feeling that it is right radically to limit the freedom of contract could possibly exist if fundamental changes were not going forward in social ideas, not only among the so-called laboring classes, but in practically all or nearly all the other classes of the community as well.

If a knowledge of the social sciences is an important part of legal education, it is never so important a part as when the social ideas of the community are undergoing comparatively rapid modification and change. When social ideas are in a comparatively static state, the correspondence between the social idea and the law will be close, irrespective of the character of the training received by members of the legal profession. But when social ideas are undergoing a process of comparatively rapid change, then the man who is set apart, as is the judge, to do a special piece of work

requiring concentration and skill is apt to get out of touch with current social ideas unless his training tends to make him interested in social questions. If, therefore, I am right in the main position I am here taking, that the important function of the judge is to adapt, within the limits and in the way indicated, the law to existing social ideas, that function at a time like the present cannot be properly performed unless we emphasize the importance of the social sciences as a necessary basis of legal education.

I am, however, by no means convinced that results of marked value will come from merely adding to the present courses in law modern teaching in economics, sociology, history and political science, or from requiring special examinations in such subjects for entrance into our Law Schools, though I do not wish to be understood as antagonistic to such additions to the curriculum of our law schools, provided the course in law can be extended beyond the present limit of three years. What law students need, however, are courses showing the development of legal principles given by men who are capable of pointing out the relation between the principle and the social ideal, on which it rests. We need books like Mr. Justice Holmes' Common Law written by lawyers interested in and trained in economic theory. Such men and such books do not now exist. They will have to be evolved from the necessity of the situation. If I may make an attempt at a practical suggestion, let those of us who are connected with Law Schools and those who are connected with departments of Philosophy, try the experiment of conducting joint seminars open to students of law and students of the social sciences, these seminars to discuss legal theory and social ideas, or, if you prefer, the development of law as affected by economic conditions. We may not at first educate our students, but we will educate each other and perhaps lay a foundation which will result in developing a class of law teachers, and may I also suggest perhaps a class of teachers of the social sciences, better able than we with our one-sided education, to perform our respective tasks.

William Draper Lewis

Philadelphia.